1990

State of Utah v. Gerard Cotero J. Lopez : Response to Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 900484-CA
v.	:	
GERARD COTERO J. LOPEZ,	:	Category No. 2
Defendant-Petitioner.	:	

RESPONSE TO PETITION FOR REHEARING

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RESPONSE TO PETITION FOR REHEARING

INTRODUCTION

Pursuant to the Court's request, the State submits this brief in response to defendant's petition for rehearing. A petition for rehearing is appropriate when the Court has overlooked pertinent facts or law, or has misapplied or misinterpreted the law. See Cummins v. Nielson, 42 Utah 157, 172-73, 129 P. 619, 624 (1913).

ARGUMENT

RESPONSE TO PETITIONER'S POINT I

This Court should decline defendant's invitation to assume the trial court made findings of fact in accordance with its conclusion that a pretext stop occurred and to affirm the suppression order. The trial court's findings of fact are inadequate under State v. Lovegren, 798 P.2d 767, 770 (Utah App. 1990), and, contrary to defendant's suggestion, this Court cannot reasonably assume the trial court actually made findings necessary to support the pretext conclusion, see State v. Ramirez, 817 P.2d 774, 787-88 n.6 (Utah 1991).

As is evident from the briefs filed by both parties, there are a number of ambiguities in this record, and it is the trial court's obligation to sort out those ambiguities and to enter clear findings of fact. Just as in Ramirez, 817 P.2d at 788, the record evidence does not clearly support the trial court's ruling, and therefore the remand ordered by this Court is appropriate. See also State v. Vigil, 817 P.2d 1296, 1301-02 (Utah App. 1991).[1] Therefore, rehearing should be denied on

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[1] In his concurring and dissenting opinion, Judge Russon argues that there is no need to remand for more complete findings in light of the undisputed evidence that the officer stopped defendant for making a turn without signaling and driving without a driver's license, violations of state statutes and offenses for which officers routinely stop drivers. State v. Lopez, No. 900484-CA, slip op. at 19 and n.1 (Utah App. Mar. 2, 1992) (Russon, J., concurring in part and dissenting in part) (citing State v. Smith, 781 P.2d 879, 882 (Utah App. 1989)). However, the trial court's written findings of fact are not sufficiently clear as to the officer's prior contacts with defendant and the officer's observation of an improper turn to support Judge Russon's argument, even though the State obviously would favor his approach.

The trial court's findings of fact, as written, suggest that the court did not believe certain parts of the officer's testimony -- e.g., the court found (1) that "[t]here was no testimony that Mr. Lopez had ever represented himself to Officer Hamner as being named or going by the name of Jose Cruz," and (2) that "Officer Hamner observed defendant make a left turn and *says* he did not see a signal," Findings of Fact and Conclusions of Law at 2 (R. 28) (emphasis added). Thus, it is not clear this Court was free to state as an unqualified fact that "[t]he individual Officer Hamner believed to be Cruz had also introduced himself to Officer Hamner," Lopez, slip op. at 2, or to observe that "[t]he trial court intimated nothing which would suggest the court found [Officer Hamner's] testimony not credible," id. at 11 n.12. In short, the trial court's poorly drafted findings, which refer to testimony or the absence thereof on certain points (rather than making an actual *finding* on the question of fact -- e.g., "The court finds that defendant did not ever represent himself as being named or going by the name of Jose Cruz" or "The court finds that defendant did not [or did] signal before he made a turn"), are inadequate and require clarification.

this issue.

RESPONSE TO PETITIONER'S POINT II

Defendant's argument concerning burden of proof does not present grounds for rehearing. It simply reflects dissatisfaction with the rule constructed by the Court, without citation to any controlling authority that compels a different rule. Accordingly, the Court should not grant rehearing on the burden of proof issue.

RESPONSE TO PETITIONER'S POINT III

The Court should grant rehearing on the issue of what role an officer's subjective intent plays in the pretext analysis. Defendant correctly points out that the majority's opinion on this subject is extremely confusing. The State agrees with defendant, albeit for different reasons, that the majority's analysis is internally inconsistent and requires clarification.

The majority began its analysis of the subjective intent question by correctly stating the law: "[T]he issue of whether a traffic stop is a pretext stop cannot turn on the issue of an officer's subjective intent, but rather, must turn on the objective question of whether a reasonable officer would have made the stop under the same circumstances absent the illegal motivation. . . . Further, a focus on an individual officer's subjective intent as the measure of whether a stop is a pretext would violate the United States Supreme Court's ruling that the Fourth Amendment mandates an objective inquiry into police activity." State v. Lopez, No. 900484-CA, slip op. at 10 (Utah

App. Mar. 2, 1992). It then properly concluded that "[t]he trial court incorrectly focused on the officer's subjective motivation while ignoring whether the officer would have made the stop regardless of that motivation." Id. at 11. However, in its discussion of "relevant evidence" which follows these correct statements and application of the law, the majority's analysis begins to break down.

Throughout its opinion, the majority appears to define the "would have stopped" prong of the pretext test as whether the particular officer or officers in general routinely stop for the offense in issue. For example, in discussing what evidence is relevant to the pretext inquiry, the majority stated:

> Simply put, if an officer testifies to routinely making stops for a particular offense, it tends to show the stop was objectively reasonable; if the officer admits to having never before stopped a driver for the offense, it tends to show a reasonable officer would not have made the stop. . . . In addition to evaluating the facts and circumstances surrounding the traffic stop, a trial court may also properly consider evidence of the normal practices of other police officers under similar circumstances, as well as indications of departmental policy.

Lopez, slip op. at 14. When analyzing the burden of proof issue, it observed:

> [B]ecause the State has the primary access to most of the relevant evidence, including the officer's past stop practices and the practices of other officers, we believe the burden of proof is properly placed on the State. . . . The State may easily meet its burden by introducing the testimony of the arresting officer's justifications for the actual stop and the officer's normal

> practices. Absent some concession that the stop was outside normal practice, this may be all that is necessary. . . . A defendant might also rebut the State's evidence by introducing evidence that other officers normally do not stop vehicles for the same infractions or that stopping for such infractions is at odds with departmental policy or practice. . . . Only a small minority of traffic stop cases implicate the pretext doctrine when the focus is on "whether a reasonable officer would have made the stop absent the illegal motivation." In clear-cut cases, as mentioned earlier, of driving eighty miles-per-hour in a school zone or consuming alcohol while driving, common knowledge suggests that reasonable officers everywhere routinely stop such offenders. In such cases, the pretext doctrine cannot be asserted in good faith and can be dismissed quickly by trial judges.

Id. at 15-16 and nn. 17 & 18. The apparent sum total of the majority's statements is that the "would have stopped" prong is decided by determining whether the stop for the particular violation is consistent with usual or routine police practice. Indeed, that is precisely the test the Tenth Circuit enunciated in United States v. Guzman, 864 F.2d 1512, 1518 (10th Cir. 1988), a case cited by the majority as support for retention of the pretext doctrine, see Lopez, slip op. at 5, 6.

Nevertheless, in a mystifying footnote, the majority, while acknowledging the Court's previous statement that the officer's subjective motivation is irrelevant[2], holds that evidence of an officer's subjective intent is "relevant to what a reasonable officer would do under the circumstances." Lopez,

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[2] State v. Sierra, 752 P.2d 972, 977 (Utah App. 1988), disavowed on other grounds, State v. Arroyo, 796 P.2d 684 (Utah 1990).

slip op. at 12 n.14. In reaching this conclusion, the majority notes that Sierra "correctly observed an officer's subjective intent is not the relevant legal standard or inquiry a court should use to determine if a stop is pretextual," but explains that "this statement was not made in the context of what evidence may be relevant to what a reasonable officer would do under the circumstances." Ibid. This cannot be true, for the entire pretext doctrine is premised upon what the hypothetical reasonable officer would do under the circumstances. See Sierra, 754 P.2d at 977-79; Guzman, 864 F.2d at 1517. Put another way, the "legal standard or inquiry" for pretext cannot be separated from the inquiry of what a reasonable officer would do under the circumstances.

Thus, if the pretext standard is truly an objective standard, which looks to the usual or routine police practice for what a hypothetical reasonable officer would do (as it must), the subjective intent of the officer has no relevance. Subjective motivation (whether good or bad) simply has no bearing on what is the usual police practice, which will necessarily be established through the detaining officer's testimony, the testimony of other officers, and documentary evidence concerning departmental policy. For example, when a pretext challenge is made to a stop for failure to signal before making a turn, it does not matter that the officer also had a "hunch" the driver might be involved in a recent burglary; the only consideration is whether officers routinely stop for that traffic violation. State v. Smith, 781

P.2d 879, 883 (Utah App. 1989) (stop for failing to signal before making turn not pretextual, as "this is the type of clear cut traffic violation for which officers routinely stop citizens and issue citations;" "fact that [officer]'s attention was initially drawn to the defendant's car because of what he considered suspicious activity in a high-crime area does not insulate the defendant from being stopped for a traffic violation"). Nor would it be of any consequence that the officer in the foregoing scenario had no interest beyond the traffic violation in making the stop; again, the only consideration is whether the stop comports with usual police practice.

In sum, although the majority has genuinely sought to clarify the pretext doctrine, the State agrees with defendant that its holding regarding evidence of the officer's subjective intent is extremely confusing and requires clarification. Because consistent and intelligent application of the pretext doctrine in the lower courts depends on clear direction from this Court, and since the Lopez decision will likely represent the seminal case from this Court on the pretext doctrine, the Court should grant rehearing on the subjective intent issue, request additional briefing from the parties, and restore the case to the calendar for reargument. Utah R. App. P. 35(c).

CONCLUSION

Based on the foregoing argument, the Court should grant rehearing only on the issue of the relevance of the officer's subjective intent. The Court should request additional briefing

from the parties on that issue and restore the case to the calendar for reargument. Utah R. App. P. 35(c).

RESPECTFULLY submitted this 21st day of April, 1992.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Response to Petition for Rehearing were mailed, postage prepaid, to James Valdez, Joan C. Watt, and Elizabeth Holbrook, Salt Lake Legal Defender Assoc., Attorney for Petitioner, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 21st day of April, 1992.

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